MOTION FILED
FEB 13 1997

(3)

No. 96-1112

In The

Supreme Court of the United States

October Term, 1996

MARTECH USA, INC.,

Petitioner,

v.

GIL HOEFLICH,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District

MOTION FOR LEAVE TO FILE, AND BRIEF OF INSURANCE COMPANY OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF INSURANCE COMPANY OF NORTH AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Insurance Company of North America respectfully moves for leave to file the attached brief *Amicus Curiae*. The consent of Respondent has been obtained. The consent of Petitioner has not been obtained.

Insurance Company of North America has a direct interest in this case. It underwrites the insurance for liability of the employer under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (LHWCA). Liability for the injuries suffered by Gil Hoeflich rests either with Petitioner Martech as vessel owner and Jones Act employer through its Jones Act insurers, or with employer Martech through its LHWCA insurer, these *amicus curiae*.[1]

In addition, Insurance Company of North America is a major underwriter of employee injury risks under California law, under the LHWCA, and under the maritime laws. In that capacity it has an interest in rules of law establishing Jones Act status that are as clear and easy to administer as possible. The rules sought by petitioner would add confusion and difficulty of administration to this already difficult area of law. This would be to the

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[1] Insurance Company of North America has not accepted liability under the LHWCA, and no order has issued in that forum. However, it made two $10,000 payments to Mr. Hoeflich, on the understanding that those payments would either be credited against liability under the LHWCA, if the employee were found not to be a seaman, or would be a lien upon the Jones Act recovery, if the jury found him to be a seaman.

detriment of these *amicus curiae* and the multitude of employers it insures.

Amicus curiae for these two reasons request leave to file the attached brief objecting to the Petition for a Writ of Certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interests of the *amicus curiae* are set forth in the Motion accompanying this brief.

STATEMENT OF THE CASE

Amicus curiae adopt the Counter Statement of the Case submitted by Respondent.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE ISSUE IT ADDRESSES HAS ALREADY BEEN DECIDED BY THIS COURT

Petitioner seeks review of an unpublished, mid level state appellate court decision that affirmed a jury finding of seaman status. That state decision does not conflict with any decision of this Court, nor with decisions of the federal appellate courts. It does not present an urgent or important question that warrants this Court's review.

Petitioner seeks a rule for establishing seaman status that looks backward in time; that is based primarily upon a statistical analysis of work done in the past.

Amicus curiae argue that when the assignment changes the status changes. The nature of the new assignment determines seaman status. If the nature and duration of the new assignment is such that it alone qualifies an employee for seaman status, then it matters not whether an injury occurs on the first or the last day of that new assignment.

This court recently set forth very clear and functional guidance.

> [W]e see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well.[2]

There is no good reason to revisit that issue. There are several good reasons not to do so.

The result sought by Petitioner would lead to incongruous results, difficulty of administration, and frustration of the Jones Act's purpose. (a) Looking only backward in time, similarly situated employees hired at different times or from different sources, but injured in the same accident while doing the same work would be treated differently. (b) Ignoring the anticipated duration of a current assignment would create difficulty of administration. It would require this Court to set a standard for determining how far into a project or a voyage is far enough to establish seaman status. (c) Employees such as

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[2] *Chandris, Inc. v. Latsis*, ___ U.S. ___, 115 S.Ct. 2172, 2191 (1995).

Mr. Hoeflich would be denied the benefits of the Jones Act at a time when risk of injury is greatest, at the beginning of a project.

Petitioner also contends a Writ should be granted because this case somehow relates to the *Papai*[3] case, which is currently pending at the Court. There is no similarity between the two cases. *Papai* asks if an administrative decision under the Longshore and Harbor Worker's Compensation Act estops a subsequent Jones Act trial on seaman status. Here, not only has there been no Longshore determination or order, but no initial notice. Neither Martech nor Mr. Hoeflich reported the injury to the LHWCA insurer. Only after the Jones Act insurer stopped payment was the LHWCA insurer given notice. *Papai* also asks if the fleet seaman doctrine can be expanded beyond the fleet owned or controlled by the employer. That issue is not a factor in this case.

A. THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS TO ESTABLISH A RULE THAT WOULD TREAT SIMILARLY SITUATED EMPLOYEES DIFFERENTLY

Just prior to his injury, Mr. Hoeflich had been reassigned to a new project. In the past he had worked from shore or from piers as a deep sea diver. Those assignments did not qualify him as a seaman, because he was not then associated with a vessel. However his new assignment did associate him with the vessel ARCTIC CAROLYN. The jury in this case found that assignment

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[3] *Harbor Tug & Barge v. Papai*, 95-1621.

qualified Mr. Hoeflich as a seaman. Petitioner contends the jury finding was in error because, at the time of the injury, Mr. Hoeflich had not yet been on the ARCTIC CAROLYN for a substantial period of time.

The Petition for Writ of Certiorari should be denied, because it asks the Court to establish a rule that would lead to incongruous and inequitable results.

For example, consider the possibility of two divers injured in the same accident, but with different work histories. If one had just been assigned to the project, as respondent had been in this case, but had previously worked in a non-seaman capacity, while the other diver had worked as a seaman in the past, should they be now treated differently? Applying the result sought by Petitioner would grant seaman's remedies to one but not the other, though both were doing exactly the same work at exactly the same time for exactly the same employer under exactly the same conditions. It would be bad public policy to have a rule that would allow such an incongruous result.

B. THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS A RULE THAT WOULD BE EXTREMELY DIFFICULT TO ADMINISTER AND WOULD CREATE UNNECESSARY INCONGRUITIES

Problems of administration would occur with any likely rule promulgated in response to the Petition for Writ of Certiorari. Again, the guidelines in *Chandris* are workable, and afford ease of administration. But if it is necessary to consider how long an employee has been on a present assignment before granting him seaman status,

the question immediately rises, how long is long enough? Is 30 days a reasonable length of time? Many traditional voyages in modern ships don't last 30 days. A sailor who signs on for a round trip Liverpool-New York voyage may well not qualify as a seaman, though he performs traditional seaman's duties on a vessel in navigation on the high seas. Is duration to be measured by a proportion of the voyage or project completed? What happens if the voyage lasts longer than anticipated or the project runs into delays and goes longer than expected? That would create the untenable situation where an employee might be considered a seaman at the time of injury, but in retrospect be determined not to be a seaman because he was injured too early as a percentage of the voyage or project.

The same problem exists with comparing an employee's length of time on the current project with his overall work history. An employee newly hired with no prior work history can claim 100 percent of his career is as a seaman. But a fellow employee, in Mr. Hoeflich's circumstance, could only claim a small percentage of his entire work history worked as a seaman. Again, this presents the incongruous result of two employees doing exactly the same thing for the same pay on the same project injured perhaps in the same accident, and treated differently.

In addition, if past work history determines status, there is an incentive for employers to hire those without seaman experience in order to avoid Jones Act liability. Such discrimination may not be illegal, but would certainly be bad public policy. These *amicus* contend it

would not be good policy to have a rule of law which would encourage such discrimination.

C. THE WRIT SHOULD BE DENIED BECAUSE IT SEEKS A RULE THAT WOULD FRUSTRATE THE PURPOSE OF THE JONES ACT

Those who go down to the sea in ships are exposed to certain perils that their shore-bound brethren avoid. A considerable body of maritime law, including very generous remedies, have been developed in view of these special perils. Nowhere is this truer than among those who dive deep below the sea's surface.

Petitioner seeks a rule for establishing seaman status that requires a duration of work prior to the injury in order to qualify as a seaman. But common sense suggests that the greatest danger to deep sea divers occur early in a project rather than later. The sub-surface strata is as yet unknown. The under sea work has not yet fallen into a routine. The crew of the vessel has not yet coalesced into a smoothly operating team. Therefore injuries are at least as likely and perhaps more likely to occur earlier than later in a project. Yet petitioner's request would cut off those first few days, when the more generous remedies available to a seaman are most in need.

This incongruity like those two stated above make it inappropriate to grant the Writ for Certiorari.

CONCLUSION

There is no conflict among the circuits, no conflict with this Court's decisions, and no important federal question in need of resolution to justify review of the unpublished appellate court decision in this matter.

This court has set forth a good and functional guideline for determining when seaman status is achieved. Status changes when the assignment changes. There is no good reason to revisit that issue. There are several good reasons not to do so. Any rule other than that set forth in *Chandris* would lead to inequitable treatment of similarly situated employees, would lead to difficulty of administration, and would deny seaman's remedies to some seaman most in need of them. For all these reasons *amicus curiae* request that the Petition for Writ of Certiorari be denied.

Dated: February 13, 1997

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